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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

No. 2016-001512

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Eugene G. Griffith, Jr., Circuit Court Judge

Opinion No. 5387 (S.C. Ct. App. Filed March 2, 2016)
Appellate Case No. 2014-00946

Richard Wilson, Michael J. Antoniak, Jr., Marsha L. Antoniak,
Anita L. Belton, Prescott Darren Bosler, Johnny Calhoun, Sallie
Calhoun, Cynthia Gary, Robert Wayne Gary, Eugene P. Lawton,
Jr., Jeanette Norman, James Robert Shirley, Robert W. Spires,
Crystal Spires Wiley, Lewis S. Williams, Janie Wiltshire, Benjamin
Franklin Wofford, Jr., and Rebecca Hammond Wofford, *Petitioners,*

v.

Laura B. Willis and Jesse A. Dantice, individually and as agents
and/or brokers for Southern Risk Insurance Services LLC, Travelers
Casualty Insurance Company of America, Allied Property and Casualty
Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co.,
Safeco Insurance Co. of America, and Foremost Insurance Co.;
Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co.
of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co.,
Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and
Foremost Insurance Co.; and Laurie Williams, *Defendants,*

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co.,
and Safeco Insurance Co. of America are *Respondents.*

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INTRODUCTION

As the Petition established, the court below ruled that an insurance company charged with violating South Carolina law could force customers and other members of the public allegedly harmed by its conduct to arbitrate their statutory and common-law claims pursuant to an arbitration clause in a contract between the insurer and another company. The court did this even though *none* of the plaintiffs agreed to arbitration; *none* of the plaintiffs is a party to the contract containing the arbitration clause or have sought or obtained any benefits from it; *none* of the plaintiffs' claims falls into the limited scope of the arbitration clause; and the only written contracts that *do* exist between Defendants and Plaintiffs are insurance policies, which do not (and cannot by law) require arbitration. There was absolutely no valid legal or factual basis for compelling arbitration, and the decision directly conflicts with this Court's decisions.

Defendants offer no legitimate defense of the decision below—only blatantly false characterizations of the facts and misstatements of law. For example, Defendants insist that the *only* wrongful acts asserted against them in the Complaints are their supposed failures to supervise and control Willis, that the Complaints make *no other allegations* regarding the Insurers' conduct, and that the Complaints do not allege that Defendants had any direct involvement with Plaintiffs—but the Complaints are full of examples of precisely these kinds of allegations. Likewise, Defendants argue that as a matter of South Carolina law, an insurer cannot be liable for the kind of conduct of which their agent Willis has been accused—but the only case they cite for that supposed rule held the opposite. That Defendants would resort to such lengths in an effort to preserve the dangerous and unprecedented decision of the Court of Appeals only confirms the necessity of this Court's intervention.

In addition to the sweeping and novel legal errors of the court below, there is another, equally important, reason warranting this Court's exercise of its discretion to grant review: The

alleged connection between these Plaintiffs and the arbitration clause the court below enforced against them is so dubious that, if the decision below is permitted to stand, there will be nothing to stop a corporation sued for any violation of law from invoking *any* arbitration clause in an *unrelated* contract against individuals who are not parties to—indeed, are total strangers to—that contract. Indeed, under the reasoning advanced by Defendants and accepted by the court below, if a company truck crashes into a motorcycle, and the motorcycle rider sues the trucking company for negligence, the company could force the motorcycle rider into arbitration if there happens to be an arbitration clause in the truck driver’s employment contract with the trucking company. Or, if a patient harmed by a doctor at a hospital sued the hospital, the hospital would be able to force the patient’s claims into arbitration based on a clause in the contract between the hospital and the doctor. If the Court agrees that such an outcome is not permissible under South Carolina law, the Petition should be granted.

ARGUMENT

I. There Is No Factual or Legal Basis for Enforcing the Arbitration Clause in the Agency Agreement—A Contract Between Defendants and Another Company—Against Plaintiffs.

It is undisputed that the Agency Agreement and its arbitration clause bind only two parties—each Defendant and Southern Risk—and expressly disclaim extending any obligations on the part of Defendants to anyone other than the Southern Risk agency. *See* Pet. 6-7. It is also undisputed that Plaintiffs, who are customers and competing agents harmed by Defendants’ conduct, were not even aware of the Agency Agreement before Defendants moved to compel arbitration. The court below nonetheless held that Plaintiffs’ “complaints seek to benefit from the enforcement of” the Agency Agreement, and thus that Plaintiffs should be “equitably estopped from arguing that their status as nonsignatories precludes enforcement of the arbitration

clause” against them. (App. 928.)¹

The parties agree that, as a matter of law, equitable estoppel applies only against non-parties who have consistently sought to enforce the contract containing the arbitration clause—for example, by suing for damages for its breach. Resp. 18; *see, e.g., Int’l Paper Co. v. Schawbedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2011); *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290, 297, 733 S.E.2d 597, 601, 605 (Ct. App. 2012). They also agree that, where a non-party is not seeking to enforce or benefit from the contract containing the arbitration clause, but instead seeks to vindicate rights that are *separate* from the contract at issue, estoppel does not apply. *See Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014). In *Malloy*, this Court held that a company was not permitted to force a non-party plaintiff’s claims into arbitration based on a clause in a contract with a different person. A one-time death beneficiary of a client of Merrill Lynch sued the company for allegedly interfering with his inheritance by changing the client’s will. Merrill Lynch tried to compel arbitration pursuant to a clause in the contract between it and the decedent, arguing that the *only* source of the legal duties it had potentially breached was this contract between the company and another party. But this Court saw through that argument, recognizing that Merrill Lynch’s alleged violations of law were distinct from its contractual duties to its client. *See id.* at 562, 762 S.E.2d at 693; *see also Boedeker v. Rogers*, 736 NE. 2d 955, 957-58 (Ohio Ct. App. 1999) (claims by doctors against officer of medical insurance company arising from company’s collapse were not

¹ It is a misnomer to describe Plaintiffs as mere “nonsignatories” to the Agency Agreement. It is black-letter law that one can be a **party** to a contract even if one is not a **signatory** to it, because a signature is not the only means of manifesting assent to contract terms. For example, a consumer who receives reasonable notice from a lender that she will be deemed to assent to credit card terms and conditions if she uses the credit card, and who then does use the card, is bound by the terms and conditions. *See, e.g., Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009). In contrast, Plaintiffs here are non-*parties*: they are not named as parties in the Agency Agreement; they were never offered the terms of the Agency Agreement; and they never accepted those terms in any way.

subject to arbitration under clause in employment contract between company and officer because doctors were not parties and had alleged that officer violated state law, not that he breached his employment contract).

In order to distinguish *Malloy*, equate this case to *Pearson* and *International Paper*, and defend the decision below, Defendants attempt to re-cast Plaintiffs' allegations against them as claims for breach of the Agency Agreement. First, they argue that, as a factual matter, Plaintiffs' only allegations relate to their failure to supervise and control Willis. Second, they argue that the only possible legal basis for holding Defendants liable to Plaintiffs is for violations of the Agency Agreement. Defendants are wrong on both points.

A. The wrongdoing alleged against Defendants does not arise from their contractual duties to Southern Risk.

Defendants' central argument is that "the *only* wrongdoing alleged against the Insurers" is Defendants' alleged failure to "investigate, train, supervise, detect, and prevent Willis' wrongdoing," and that these claims "rest on rights or duties imposed solely by the Agency Agreement." Resp. 11, 13, 15 (emphasis added). In fact, Defendants repeat this point *twelve times* in the first 16 pages of their brief.² The factual record, however, shows otherwise.

1. Plaintiffs make numerous allegations that Defendants are liable for their own conduct. Defendants' argument depends on the factual premise that Plaintiffs' claims "are limited to the Insurers' alleged failure to properly investigate, train, supervise, detect and prevent Willis' wrongdoing." Resp. 7-8. According to Defendants, the complaints "make *no other factual allegations* regarding the Insurers' conduct nor do they allege the Insurers themselves

² "Proof by repeated assertion" is a logical fallacy in which a proposition is restated repeatedly and the repetition is offered as proof of the truth of the assertion, regardless of evidence to the contrary. Austin J. Freeley, David L. Steinberg, ARGUMENTATION AND DEBATE; CRITICAL THINKING FOR REASONED DECISION MAKING (Wadsworth Cengage Learning, Boston, 2009), p. 196.

had *any contact* with the Petitioners.” Resp. 14 (emphasis added). But the complaints contain extensive allegations detailing Defendants’ conduct as well as their contact with Plaintiffs. For example, they allege that Defendants’ communications concerning billing caused them to pay greatly increased premiums (App. 139-40); and that Defendants issued insurance policies for the wrong vehicles, resulting in no proof of insurance (App. 375); conspired to put law-abiding insurance agents out of business (App. 393); and intentionally caused the breach or termination of competing agents’ contracts in order to destroy their business (App. 393-94). Plaintiffs also allege breach-of-contract claims arising from policies issued by Defendants (App. 117), as well as the failure to issue valid policies after accepting money in payment for issuing policies (App. 115-16; App. 192-95); bad faith claims arising from Defendants’ alleged denial of Plaintiffs’ valid insurance claims (App. 116-17; App. 195); consumer protection claims arising from Defendants denying coverage and then accusing Plaintiffs of illegal and/or fraudulent acts (App. 152); negligent misrepresentation claims arising from Defendants’ alleged breach of their “duty of care to Plaintiffs” by “disseminating false information, authoring fraudulent and false insurance documents, accepting and converting cash payments instead of paying premiums, and issuing bogus policies” (App. 334; App. 367); and conversion claims arising from Defendants’ alleged taking of Plaintiffs’ insurance premiums for their own benefit (App. 103-04). These claims are not limited to Willis, but rather expressly include the Insurers. The factual record also reveals extensive direct contact between Defendants and the Customer Plaintiffs, including letters from Safeco and Montgomery to Plaintiffs stating, “We’ll take care of you” and promising quality service (App. 251, 253); letters sent by Defendants promising coverage (App. 150-51); and communication between Defendants and Plaintiffs concerning rental cards and claims adjustments (App. 193). None of these allegations relate to any of Defendants’ contractual

duties to Southern Risk under their Agency Agreement.

2. Plaintiffs make numerous allegations that Defendants are responsible for Willis' conduct. Defendants also claim that “None of the Complaints assert any claim, theory, or cause of action based on vicarious liability or respondeat superior, nor do they allege the Insurers are responsible for Willis' wrongful acts.” Resp. 14-15. But in fact—as Defendants acknowledge elsewhere in their Response³—the complaints make numerous allegations that Defendants are responsible for Willis' wrongful conduct. *See, e.g.*, App. 103 (“Defendants by and through their acting agent . . . made numerous representations to Plaintiff and the general public.”); App. 103-04 (alleging that “Defendants individually and/or through their authorized and acting agent . . . received the Plaintiffs' insurance premiums and converted the same to their own use and benefit.”); App. 120 (alleging that “Defendants by and through their acting agent . . . have gained an unfair and illegal business advantage”); App. 162 (alleging that Defendants used “many illegal and improper tactics . . . to take advantage of members of the general public . . . for the purpose of making greater profits”); App. 162-63 (alleging that Defendants expressly or impliedly authorized Willis to forge insurance documents, complete false applications, use cash transactions, issue bogus policies, fraudulently adjust claims, and commit other unlawful acts).

3. Any contractual duties Defendants owe to the Customer Plaintiffs arise from insurance policies and/or promises made by Defendants to Customers, including promises made by Willis that bind Defendants—none of which have arbitration clauses. Defendants' reason for going to such great lengths to tie Plaintiffs' allegations to the Agency Agreement is that it is the only contract that has an arbitration clause. But the only written contracts *between Plaintiffs and Defendants* are, of course, the insurance policies (to the extent policies were

³ Resp. at 3 n.3 (“The Complaints allege the Insurers were liable for Willis' misrepresentations, fraud, unfair and deceptive acts, and conversion.”).

issued). Discovery on the merits was stayed pending resolution of Defendants' intervening motion to compel arbitration, but based on the record thus far, we know two important facts about the policies. First, each contains an integration clause stating that there are no other contractual obligations between the parties. *See, e.g.*, App. 75 ("This policy, your Declarations page and endorsements issued by us to this policy contain all the agreements between you and us").⁴ The policies do not even mention, let alone incorporate, the Agency Agreements between Southern Risk and Defendants.

Second, we know that the policies do *not* have arbitration clauses. *See, e.g.*, App. 53-85 (Safeco policy). As explained in the Petition, South Carolina law prohibits the enforcement of arbitration clauses in insurance policies. *See* Pet. 17 n.6. Consistently with this, the policy in the record has a term in its General Provisions section entitled "Legal Action Against Us" which purports to impose certain requirements before a legal action may be brought against the Insurer in court, but makes no mention of arbitration. App. 76.

4. Defendants conceded that the duties they owe to the Customer Plaintiffs arise from South Carolina law and the insurance policies—not the Agency Agreements with Southern Risk. In their answers to Plaintiffs' complaints, Defendants never cited the Agency Agreement. Instead, they acknowledged that any "duties owed by them to an insured are set forth in certain statutes, in case law, and in the contract of insurance between them and their insured." App. 401. This cannot be reconciled with Defendants' subsequent claims that "all of the allegations . . . against the Insurers arise from rights, duties, and obligations imposed solely

⁴ An integration clause is "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract." Black's Law Dictionary (10th ed. 2014). *See also Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 412, 756 S.E.2d 148, 150 (2014), *reh'g denied* (June 25, 2014).

by the Agency Agreement” Resp. 6-7. Defendants got it right the first time.

5. Defendants’ own conduct made clear that they know the Agency Agreement does not govern their relationship with the Customer Plaintiffs. As Defendants concede, they filed declaratory judgments against some of the Plaintiffs in court. Resp. 5. In fact, Defendants have sued some of the Customer Plaintiffs twice—first in federal court, then state court. *Id.*; App. 30-33. In both actions, Defendants argued that these courts had jurisdiction over the parties’ dispute. App. 30, 226. Only a year later, after extensive litigation, did Defendants decide to switch tactics and invoke the arbitration clause in the Agency Agreement with Southern Risk. If Defendants actually believed that their legal relationship with their customers and policyholders was governed by the Agency Agreement and its arbitration clause, why would they have filed claims against Plaintiffs in court—not once, but twice? When they sued their customers, why didn’t they sue them for violations of the Agency Agreement? And why did they wait a whole year into this litigation to suddenly raise the arbitration clause? The answer is that the Agency Agreement and its arbitration clause never applied to these Plaintiffs, and Defendants knew it.

B. Under South Carolina law, Defendants’ liability to these Plaintiffs does not depend on their Agency Agreement with Southern Risk.

Defendants also suggest that the only possible liability they could possibly have to Plaintiffs would have to arise from their breach of their contractual duties to Southern Risk—nothing else. By that reasoning—if an insurance company’s only legal duties to the public, consumers, other businesses, and to its insured, are those listed in its contracts *with insurance agencies*—the company would have no duty to comply with any laws. But that can’t possibly be right. Contractual duties do not supplant existing legal duties—they supplement them. All companies doing business in South Carolina are bound by state laws, regardless of whether the

company may have also voluntarily taken on contractual responsibilities to another company.

An insurance company that enters into a contract with an insurance agency is, for example, still bound by zoning regulations, criminal laws, tax laws, and consumer protection laws. And claim against the company for violation of one of these laws does not become a breach-of-contract claim simply because the company has a contractual relationship with another company.

None of the cases Defendants cite stand for the proposition that an insurer has no legal duties to customers or the public other than whatever the company might choose to agree to in a contract with an agency. Resp. 12-13 & n.10. Some of the cases recognized that insurers *do* owe noncontractual duties to other parties. *See, e.g., Pan-Am. Life Ins. Co. v. Roethke*, 30 S.W.3d 128, 133 (Ky. 2000) (holding insurer could be vicariously liable for agent’s misrepresentations); *Vigilante v. Phoenix Mut. Life Ins. Co.*, 755 F. Supp. 25, 28-29 (D. Mass. 1991) (dismissing negligent misrepresentation and unfair and deceptive acts claims against insurer on the merits because there was no evidence insurer had misrepresented the character of its agent—not because the insurer had no duty to the plaintiff). And the rest of their cases either take language out of context, *Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50 n.7, 717 S.E.2d 589, 594 n.7 (2011) (describing duties of insurer to a policyholder as “contractual in nature” *with respect to the policy*); are irrelevant because they involve alleged contractual duties, *Bluehaven Funding, LLC v. First Am. Title Ins. Co.*, 594 F.3d 1055, 1061 (8th Cir. 2010); or narrowly hold that in a particular instance, an insurance company did not owe the plaintiff a specific duty, *e.g. Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 331-32, 574 S.E.2d 502, 508-09 (Ct. App. 2002) (insurer did not owe fiduciary duty to applicant for insurance); *In re Evans*, 464 B.R. 272, 288 (Bankr. S.D. Miss. 2011) (title insurer did not owe a duty to insured banks to audit, monitor, or supervise the insurer’s “approved attorneys”); *Vincent v. Safeco Ins. Co. of*

Am., 29 P.3d 943, 946 (Idaho 2001) (insurer did not assume duty to train and supervise its insurance agents by selling materials for continuing education requirements); *Dusina v. Bowers*, No. 13311, 1992 WL 246033, at *4 (Ohio Ct. App. Oct. 2, 1992) (insurer had no duty to train an independent insurance agent who did not purport to represent the insurer during the transaction at issue).⁵

Furthermore, it is clear that under South Carolina law, insurance companies like Defendants are subject to many duties unrelated to whatever contractual obligations they may have taken on. *See, e.g., Ramey v. Carolina Life Ins., Co.*, 244 S.C. 16, 24, 135 S.E.2d 362, 366 (1964) (“[A]n insurance company has a duty to use reasonable care not to issue a policy of life insurance in favor of a beneficiary who has obtained such policy without the knowledge or consent of the insured.”); *Hosp. Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 9 S.E.2d 796 (1940) (insurer can be sued by competitor for libel); *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 442, 339 S.E.2d 142, 147 (Ct. App. 1985) (holding that tort law imposed a “duty to exercise reasonable care in giving information . . . when the defendant has a pecuniary interest in the transaction,” and that an insurer and insurance adjuster “owed a duty to [insured] to use due care in giving him information”).⁶

⁵ Defendants’ other cases involve duties *not* to customers or competing agents such as Plaintiffs, but between insurance companies and their *agents*. *See Consol. Insured Benefits, Inc. v. Conseco Med. Ins. Co.*, No. 6:03 CV 03211 RBH, 2006 WL 3423891, at *13-15 (D.S.C. Nov. 27, 2006) (insurer and independent insurance agent were not in a “marketing partnership” and thus insurer did not owe fiduciary duty to agent); *Lumbermens Mut. Cas. Ins. Co. v. First Ins. Servs., Inc.*, 417 F. App’x 247, 251 (4th Cir. 2011) (insurance agent owed no fiduciary duty to insurer); *Joyce v. Benefits Mktg. Grp., Inc.*, 32 F.3d 562 (4th Cir. 1994) (insurance company owed no duty to insurance agent outside of contract with respect to lost commissions on sales of insurance policies). While perhaps such cases would be relevant in a case brought by Southern Risk against Defendants (or vice-versa), they are irrelevant to the question before the Court, which is whether there was any valid basis for binding these Plaintiffs to the Agency Agreement’s arbitration clause.

⁶ Other jurisdictions, likewise, have held that insurers owe noncontractual duties under their unfair and deceptive trade practice statutes, which impose duties upon all businesses. *See e.g., Panag v. Farmers Ins.*
cont’d on next page

2. South Carolina law does hold insurance companies liable for the conduct of their agents—including the kinds of legal violations Plaintiffs allege Willis committed here.

Defendants suggest that, even if Plaintiffs did allege that they are responsible for Willis' misconduct (which, as demonstrated above, they did), these claims still must be limited to Defendants' duties under the Agency Agreement because, "South Carolina law is clear . . . that *an insurer cannot be vicariously liable*" for its agent's "misrepresentations, fraud, unfair and deceptive acts, and conversions." Resp. 3 n. 3 (emphasis added) (citing *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991)). Again, Defendants are badly mistaken. This Court has long held that an insurance company is "liable for third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances of duty of his agent in the courts of his employment," even if the principle "did not authorize" or even know about the conduct. *West v. Serv. Life & Health Ins. Co.*, 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951). The principal can be liable for the conduct of the agent under several theories, including *respondeat superior* or apparent authority. *E.A. Prince & Son, Inc., v. Selective Ins. Co. of Southeast*, 818 F. Supp. 910, 914 (D.S.C. 1993). Under *respondeat superior*, the agent can bind the principal if the agent was acting within the scope of his employment or authority. *Id.* Under the apparent authority test, a principal is liable for the acts of its agent if the principal has placed the agent in a position that would cause reasonable persons to be "led to believe that the agent has certain authority and they deal with the agent based on that assumption." *Id.*⁷ "The principal's liability is based upon the fact that the agent's position facilitated the consummation

Co. of Washington, 166 Wash. 2d 27, 65, 204 P.3d 885, 903 (2009) (insurer can be liable to third parties for unfair debt collection practices under the state's consumer protection act); *Hart v. Moore*, 155 Misc. 2d 203, 587 N.Y.S.2d 477 (Sup. Ct. 1992) (party injured at an insured's home could sue an insurer for fraud under state deceptive acts and practices law).

⁷ Internal quotation marks and citations are omitted unless otherwise indicated.

of the tort, in that from the point of view of the third person the transaction seemed regular and the agent appeared to be acting in the ordinary course of business and within his authority.” *Id.* (citing Restatement (Second) of Agency § 261, cmt. a (1958)).

The case cited by Defendants, *Vereen*, did *not* hold that an insurer cannot, as a matter of law, be liable for the wrongful acts of its agent. See *E.A. Prince & Son*, 818 F. Supp. at 913 n.3 (rejecting insurer’s argument that “*Vereen* supports its argument that, as a matter of law, it cannot be liable” and noting that “the issue of authority in *Vereen* was not decided [as a matter of law] but was submitted to and decided by the jury”). Rather, the Court of Appeals in *Vereen* recognized the general rule that insurers can be liable, but held that on the unique facts of that case—which involved a conspiracy between an insurance agent and a murderer to take out a life insurance policy on a man without his knowledge and then kill him for the insurance proceeds—the jury had properly found that no innocent third party had reasonably relied on the agent’s apparent authority and that the agent had acted outside the scope of his authority. 306 S.C. at 427-28, 412 S.E.2d at 425-26. In contrast, in a subsequent case where the plaintiffs *did* reasonably trust the agent’s apparent authority, and the agent had acted for the benefit of the insurer, this Court held that the insurer *was* liable for the acts of its agent. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 296-99, 468 S.E.2d 292, 295-98 (1996). The agent’s conduct that gave rise to the insurer’s liability in *Rickborn* was similar to the conduct alleged here: submitting incomplete applications, improper payment of premiums, false reassurances to the customer that he was insured when really no valid policy had been issued, etc. *Id.* at 294-95; 468 S.E.2d at 294-95. This Court held that the insurance company was liable not only for the agent’s actions, but for its own negligence and negligent supervision of its agent. *Id.* at 300-03; 468 S.E.2d at 298-99. The Court further held that an implied contract was created by the agent’s

acceptance of the customer's application for a policy, and thus that the insurer was bound by the agent's promises. 321 S.C. at 303-04; 468 S.E.2d at 299-300. Given the similarity of these allegations to those of Plaintiffs, *Rickborn* flatly disproves Defendants' argument that they cannot possibly be liable for their agent's conduct under South Carolina law.⁸

In sum, Defendants' claim that they could not possibly have any liability to Plaintiffs other than liability for breaching their Agency Agreement with Southern Risk ignores both the clear law of this state and the facts established in this case.

II. There is No Valid Legal Basis for Holding that Plaintiffs' Claims are Within the Scope of the Agency Agreement's Limited Arbitration Clause.

The Petition established that the arbitration clause in Defendants' Agency Agreement is expressly restricted to claims arising in connection with only five topics: (1) the "interpretation" of the Agency Agreement; (2) its "performance or nonperformance"; (3) its "termination"; (4) "the figures and calculations used"; and (5) "any nonpayment of accounts." (App. 464.)

Where a clause lists which disputes are arbitrable, all other disputes are outside the scope of the clause. *See generally* Pet.19-20; *Bridgestone/Firestone, Inc. v. Local Union No. 998, et al.*, 4 F.3d 918, 922-23 (10th Cir. 1993) (clause requiring arbitration of grievances concerning "the interpretation or application of [collective bargaining agreement]" did not encompass claims under employer's employee incentive program). Therefore, any claim not included in the Agency Agreement's arbitration clause's list of five topics—even if it were brought by one of the parties to the Agreement (Defendants or Southern Risk) against the other—is not arbitrable.

⁸ Defendants also argue that the only possible source of Willis' authority to act on their behalf must be the Agency Agreement. Resp. 17. However, as set out above, Plaintiffs have alleged numerous facts having nothing to do with the Agency Agreement that demonstrate Willis acted with apparent authority as Defendants' agent. And the Agency Agreement does not name Willis as a party—only Defendants and Southern Risk. While the source and extent of Willis' authority will no doubt be fully litigated on the merits, for now, what matters is that there are clearly other bases for Plaintiffs claims against Defendants other than Defendants' Agency Agreement with Southern Risk.

Plaintiffs' claims here, for unfair trade practices, fraud, conversion, civil conspiracy, breach of actual or implied insurance contracts, etc., are simply not among the arbitrable disputes.

Defendants' response on the scope argument, like their estoppel argument, depends entirely on their repeated claim that Plaintiffs' "sole" allegations against Defendants are the Insurers' alleged failure to supervise Willis and prevent her misconduct. *See* Resp. 19, 20. But this argument again falls flat. First, Defendants cannot distinguish this case from *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007), where this Court held that a borrower's claims for negligence, negligent supervision, and unfair trade practices against a lender for its failure to prevent its agents' theft of the borrower's personal identity could *not* be forced into arbitration based on a clause in the loan agreement, even though the borrower (unlike Plaintiffs here) was a party to that agreement. *See* Pet. 21-22. Under *Aiken*, even Plaintiffs' claims relating to Defendants' failure to supervise and control Willis are not subject to arbitration under the Agency Agreement's clause. And because they prefer to pretend that the "sole" allegations in the complaint are that Defendants failed to supervise and control Willis—a characterization proven to be false—they fail to offer any explanation for how the myriad other claims could possibly be within the scope of the clause.

Second, Defendants' argument that the mere inclusion of the phrase "arising out of" automatically makes an arbitration clause broad is absurd. Response 19 n. 16. Without context, there is no way to tell whether an arbitration clause is broad or narrow. For example, a clause in a contract between a customer and a beauty salon providing for arbitration of "all claims concerning quality of service arising out of Joe's appointment for a haircut on October 5, 2016" contains Defendants' magic words, but is obviously narrow. A clause in a contract between a lender and a borrower providing for arbitration of "all claims that could possibly arise between

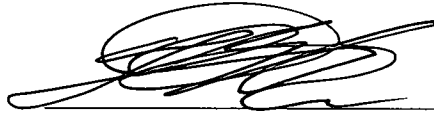
the parties,” on the other hand, lacks Defendants’ magic words, but is obviously broad. South Carolina courts, understandably, do not define an arbitration clause as broad or narrow depending on whether it uses the word “arising.” They look at whether the clause covers every kind of dispute that may relate to the parties’ relationship, or whether the clause instead is limited to disputes about specified topics. Accordingly, “Courts typically characterize arbitration agreements purporting to govern disputes ‘arising out of or related to’ *the underlying contract between the parties* as ‘broad’” *Aiken*, 373 S.C. at 149, 644 S.E.2d at 708 (emphasis added); *see also Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (clause providing for “arbitration of all disputes ‘arising out of or relating to’ *the contract*” is broad”) (emphasis added); *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterm. Co.*, 356 S.C. 202, 207-09, 213, 588 S.E.2d 136, 139, 141 (Ct. App. 2003) (distinguishing between broad and narrow clauses and giving examples of each).

Finally, a majority of this Court just affirmed that “the outrageous and unforeseeable torts exception remains a viable principle of law[.]” *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, --- S.E.2d ----, No. 2014-000782, 2016 WL 4411112 *6 (Hearn, J., concurring and dissenting) (Aug. 17, 2016). This is another reason the court below was wrong to hold that Plaintiffs’ claims arising from Willis’ conduct are within the scope of the arbitration clause. *See* Pet. 10-11, 21-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 3rd day of October, 2016.



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

No. 2016-001512

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Eugene G. Griffith, Jr., Circuit Court Judge

Opinion No. 5387 (S.C. Ct. App. Filed March 2, 2016)
Appellate Case No. 2014-00946

Richard Wilson, Michael J. Antoniak, Jr., Marsha L. Antoniak,
Anita L. Belton, Prescott Darren Bosler, Johnny Calhoun, Sallie
Calhoun, Cynthia Gary, Robert Wayne Gary, Eugene P. Lawton,
Jr., Jeanette Norman, James Robert Shirley, Robert W. Spires,
Crystal Spires Wiley, Lewis S. Williams, Janie Wiltshire, Benjamin
Franklin Wofford, Jr., and Rebecca Hammond Wofford,

Petitioners,

v.

Laura B. Willis and Jesse A. Dantice, individually and as agents
and/or brokers for Southern Risk Insurance Services LLC, Travelers
Casualty Insurance Company of America, Allied Property and Casualty
Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co.,
Safeco Insurance Co. of America, and Foremost Insurance Co.;
Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Co.
of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co.,
Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and
Foremost Insurance Co.; and Laurie Williams,

Defendants,

Of whom Peerless Insurance Co., Montgomery Mutual Insurance Co.,
and Safeco Insurance Co. of America are

Respondents.

PROOF OF SERVICE

I, the undersigned legal assistant with the law offices of Hite and Stone, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

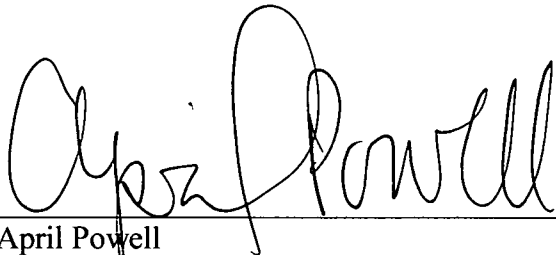
Pleadings: Petitioner's Reply in Support of Petition for Writ of Certiorari

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April Powell

October 3, 2016